UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| ASSOCIATED PRESS, Plaintiff, | : | 05 CV 5468 Index No. |
| - against - | : | ECF CASE COMPLAINT |
| UNITED STATES DEPARTMENT OF DEFENSE, Defendant. | : | |

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U.S.D.C. S.D. N.Y.
CASHIERS

Plaintiff, The Associated Press ("AP"), by its undersigned attorneys, alleges:

## INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, brought by the nation's largest newsgathering organization to compel access to records pertaining directly to the detention of hundreds of persons at the U.S. Naval Base at Guantanamo Bay, Cuba ("Guantanamo"). AP seeks access to a number of specific documents concerning detainees still held at Guantanamo, including documents relating to Administrative Review Board hearings conducted by defendant, the bases for ongoing detentions, allegations of mistreatment, and the release or transfer of detainees. AP also seeks documents concerning construction contracts that have been awarded for work performed at Guantanamo. Obtaining copies of these documents is a matter of urgent concern to the AP in connection with its continuing reporting on major constitutional, foreign policy and public policy issues presented by events at Guantanamo.

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2. For more than three years the United States has detained without charge hundreds of people at Guantanamo, initially denying them access to counsel, withholding all judicial process, and declining to apply the Geneva Conventions. In the wake of two adverse decisions by the United States Supreme Court in July 2004, defendant Department of Defense ("DOD") established a forum in which these detainees at Guantanamo could contest their status as "enemy combatants" before Combatant Status Review Tribunals ("CSRTs"), and instituted a procedure by which Administrative Review Boards ("ARBs") will assess annually whether continued confinement of an "enemy combatant" remains warranted.

3. Although the CSRTs have completed their work and dozens of detainees have now apparently been brought before an ARB, more than 500 people remain confined without charge and little is known by the public of the standards applied in requiring continued detention or the reasons for actions taken by DOD. Because of physical constraints imposed by DOD on access to Guantanamo, it is often physically impossible for a reporter to attend an ARB, and DOD has provided no transcripts or records from any ARB proceeding. It has not reported any detainee's change of status as a result of the Administrative Review Board process.

4. In November 2004 and January 2005, AP submitted FOIA requests to DOD seeking a number of specific records relating to the treatment of detainees at Guantanamo, the legal rights they were afforded, and other circumstances surrounding DOD's actions with respect to the detainees. In each case, AP requested expedited processing of its requests given the timely news value of the information sought, and in each case DOD agreed to expedite the AP's requests. Notwithstanding this purported "expedited

processing," however, defendant has failed to provide *any* of the requested documents to AP for half a year.

5. AP now seeks declaratory, injunctive and other relief to enforce its statutory right to inspect documents concerning the bases for the detentions at Guantanamo, the treatment of detainees, and the operation of the detention facility. Given the significant public interest in understanding the actions taken by the U.S. Government with respect to the individuals being held at Guantanamo Bay, and the allegations of mistreatment that have surfaced, AP seeks expeditious treatment of this Complaint pursuant to 28 U.S.C. § 1657.

**THE PARTIES**

6. Plaintiff AP is a not-for-profit membership corporation organized under the laws of the State of New York, with its headquarters located at 450 West 33rd Street, New York, New York. AP provides news to more than 15,000 news outlets every day. Its members and subscribers include this nation's newspapers, magazines, broadcasters, cable news services and Internet content providers.

7. Defendant Department of Defense is a department within the executive branch of the United States government. Defendant is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1).

**JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction over this action and personal jurisdiction over defendant pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii). This Court also has jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-06.

9. Venue is premised on plaintiff's place of business and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

## FACTS

**The Guantanamo Bay Detention Controversy Underlying AP's FOIA request**

10. The United States Government's detention of hundreds of persons at Guantanamo Bay has generated widespread controversy since early 2002. Reports of complaints ranging from constitutional violations of United States citizens' rights, to violations of international law, to claims of inhumane and cruel treatment have been published by major news outlets. Over 500 persons are still imprisoned at Guantanamo, yet only four have been charged with any crimes.

11. In late June 2004, the United States Supreme Court issued decisions in *Rasul v. Bush*, 124 S. Ct. 2686 (2004) and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). In these cases, the Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker," *Hamdi*, 124 S. Ct. at 2634, and that the United States courts have jurisdiction to hear challenges to the legality of detention of foreign nationals held at Guantanamo, *Rasul*, 124 S. Ct. at 2698.

12. On July 7, 2004, in response to these decisions, the Department of Defense announced the formation of the "Combatant Status Review Tribunal" as a forum for detainees to contest their status as enemy combatants. From August 2004 through January 2005, five hundred fifty-eight tribunals (558) convened, thirty-eight (38) of which declared the detainees examined at those tribunals not to be "enemy combatants."

13. DOD also instituted Administrative Review Boards to hold annual hearings for Guantanamo detainees akin to parole board proceedings:

> All detainees who have been confirmed to be enemy combatants by the Combatant Status Review Tribunals will be processed through the ARBs. The ARB process annually assesses whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing upon the need for continued detention. Based on this assessment, the ARB will recommend that individual detainees be released, transferred or continue to be detained.

News Release No. 1292-04, U.S. Dep't of Defense, Dec. 14, 2004, *available at* http://www.defenselink.mil/releases/2004/nr20041214-1830.html. Like the CSRTs, the Administrative Review Boards operate without many of the procedural protections known to American law. *See, e.g.*, News Transcript, U.S. Dep't of Defense, Dec. 20, 2004, *available at* http://www.defenselink.mil/transcripts/2004/tr20041220-1841.html; Notification Given to Detainees About ARBs, Dep't of Defense, *available at* http://www.defenselink.mil/news/Dec2004/d20041209ARB.pdf.

14. DOD's handling of the detainees following the Supreme Court's pronouncements continues to be questioned. On January 31, 2005, the United States District Court for the District of Columbia held that eleven (11) detainees had stated claims that the procedures employed by DOD in conducting CSRTs were insufficient, resulting in a violation of due process rights, and that the Geneva Conventions should be applied to some detainees. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005).

15. Compounding concerns about DOD's procedures for the CSRTs, none of the detainees has obtained release through the Administrative Review Board process.

16. Meanwhile, new allegations of mistreatment and abuse at Guantanamo have surfaced in recent months, leading organizations across the political spectrum to

condemn DOD's handling of the detainees. Amnesty International recently issued a report concluding that "[t]he detention facility at Guantanamo Bay has become the gulag of our time, entrenching the practice of arbitrary and indefinite detention in violation of international law." Human Rights Watch has issued a report similarly critical of DOD's handling of detainees at Guantanamo, among other facilities.

17. In response, several calls have been made for an independent investigation into the circumstances at Guantanamo. The Constitution Project, an organization comprised of the chairman of the American Conservative Union, the president of the Rutherford Institute, and various prominent figures of all ideological stripes, has called for an independent commission to investigate abuse of detainees. On May 27, fifteen House Democrats proposed legislation authorizing a congressional investigation into the situation.

**AP's Efforts to Obtain Information Concerning the Guantanamo Detainees**

18. On November 16, 2004, AP submitted a narrow, specific and particularized FOIA request to DOD seeking:

- "Copies of all documents containing any allegations or accounts of mistreatment by U.S. military personnel at Guantanamo Bay, Cuba, since the detention mission began in January 2002";
- "Copies of documents sufficient to identify each disciplinary action initiated since January 2002 as the result of an allegation of mistreatment at Guantanamo Bay, Cuba, including but not limited to the date the action was initiated, the name of the troop(s) charged, the status of the action, and a description of any disciplinary action recommended or taken";
- "Copies of documents sufficient to identify each allegation of detainee-against-detainee abuse at Guantanamo Bay, Cuba, since January 2002, including a description of the alleged abuse and any action(s) taken in response";

- "Copies of documents sufficient to identify the number of allegations of abuse at Guantanamo Bay, Cuba, since January 2002 that have been reported through the Combatant Status Review Tribunals";

- "Copies of documents sufficient to identify the number of allegations of mistreatment committed by translators at Guantanamo Bay, Cuba, since January 2002, including a description of the alleged mistreatment and any action(s) taken in response";

- "Copies of documents sufficient to identify the number of detainees transferred or released from Guantanamo Bay who had been treated for medical problems during their detention"; and

- "Copies of documents sufficient to identify each construction contract relating to work performed at Guantanamo Bay, Cuba, since January 2002, including the name of the contractor, the contract amount, and a description of the services to be provided."

(A true and correct copy of this request is annexed as Exhibit A.)

19. On January 18, 2005, AP submitted a narrow, specific and particularized FOIA request to DOD seeking:

- "Transcripts of all testimony given at the Administrative Review Board hearings at [Guantanamo];"

- "Copies of all written statements provided by any detainee";

- "Copies of all documents that have been provided by any detainee . . . to their assigned personal representatives, including reasons they furnish should they decide not to attend their Administrative Review Board hearings";

- "Copies of any affidavits submitted by witnesses to the Administrative Review Boards, including that of medical personnel";

- "Copies of the allegations against the detainees being held in Guantanamo Bay"; and

- "Details and explanations of the decisions made to release or transfer detainees, including the reason why the decision was made."

(A true and correct copy of this request is annexed as Exhibit B.)

20. AP submitted both the November 16 and January 18 requests by facsimile, stressing that the records were "of timely news value" and were sought "in connection with its reporting on a continuing news story of great interest to the public, both in the United States and abroad." Pursuant to 5 U.S.C. § 552(a)(6)(E), AP asked DOD to provide expedited treatment of its FOIA requests. Given the time-sensitive nature of the requests, AP also asked DOD to communicate any questions concerning the requests "by telephone, fax or email, rather than relying on regular mail," and to contact AP when the requested documents were ready for release so that they could be obtained quickly by courier.

**DOD's Response to AP's November 16 FOIA Request**

21. Defendant DOD sent a letter dated November 24, 2004, to AP advising that it had "granted" AP's November 16 request for expedited processing. In the same letter, however, DOD attempted to disclaim any actual obligation to expedite the request: "[P]lease be aware that the DoD component tasked to search for and review documents responsive to your request is under no obligation to process your request at the expense of performing their normal day-to-day duties." The letter did not enclose any responsive documents or indicate when responsive documents might be expected. (A true and correct copy of defendant's response to AP's November 16 request for expedition is annexed as Exhibit C.)

22. No further response to the November 16 request was forthcoming, and no documents were provided to AP within the time required by law. 5 U.S.C. § 552(a)(6)(A)(i). DOD's failure to provide a response to AP's request was improper under the statutory mandate for handling expedited requests, and effectively defeated AP's rights under the FOIA.

23. In a telephone conversation on April 20, 2005, DOD's FOIA office informed AP that its November 16 request had been "tasked out" for the process of compiling the documents, but that the office did not know – and reported it could it not even find out – whether the responsive documents had been located and/or whether they were yet being reviewed for release to AP.

24. On April 22, 2005, AP submitted to DOD, by facsimile and first class mail, its appeal of the constructive denial of AP's request. AP requested expedited treatment of the appeal, explaining again its need for the information sought in connection with a continuing news story of great public interest. (A true and correct copy of AP's administrative appeal is annexed as Exhibit D.)

25. By undated letter postmarked May 11, 2005, DOD responded to AP's administrative appeal as follows:

> We granted the AP expedited processing in our November 24, 2004 response . . . . That determination is still valid. However, as a result of your appeal for a constructive denial because no records have been processed, the AP's request of November 16, 2004, will be processed within the expedited FOIA appeals channel.

(A true and correct copy of this letter is annexed as Exhibit E.)

26. As of the date of the filing of this Complaint, no documents have been received, nor has the DOD advised AP of any reason for withholding or delaying its responses to the FOIA requests.

**DOD's Response to AP's January 18 FOIA Request**

27. By letter dated January 19, 2005, defendant DOD informed AP that it had "granted" AP's January 18 request for expedited processing. This letter was identical in substance to the letter dated November 24 responding to AP's November 16 request. (A true

and correct copy of defendant's response to AP's January 18 request for expedition is annexed as Exhibit F.)

28. This response by DOD to AP's request was improper under the statutory mandate for handling expedited requests, and effectively defeated AP's rights under the FOIA.

29. DOD failed to produce *any* records to AP in response to its January 18 request, to claim any exemption for withholding the requested records, or to communicate with AP in any fashion regarding the request. Accordingly, on April 15, 2005, AP submitted to DOD, by Federal Express, its appeal of the constructive denial of AP's request. AP expressly requested expedited treatment of the appeal, explaining again its need for the information sought in connection with a continuing news story of great public interest. (A true and correct copy of AP's administrative appeal is annexed as Exhibit G.)

30. By undated letter postmarked May 11, 2005, DOD responded to AP's administrative appeal in exactly the same way it responded to AP's administrative appeal from the constructive denial of its November 16 FOIA request. (A true and correct copy of this letter is annexed as Exhibit H.)

31. DOD has not provided any further response to AP's administrative appeal of the denial of its January 18 FOIA request.

32. More than twenty days have passed since AP submitted its April 15 and April 22, 2005 administrative appeals to DOD.

33. AP has exhausted its administrative remedies.

**FIRST CAUSE OF ACTION**
(Violation of FOIA for constructively failing to expedite AP's November 16 request)

34. AP repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

35. Defendant's failure to expedite the processing of AP's November 16 FOIA request and AP's appeal (despite its repeated statements purporting to "grant" AP's request to expedite) violates FOIA, 5 U.S.C. § 552(a)(6)(E), and defendant's own regulations promulgated thereunder.

**SECOND CAUSE OF ACTION**
(Violation of FOIA for constructively failing to expedite AP's January 18 request)

36. AP repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

37. Defendant's failure to expedite the processing of AP's January 18 FOIA request and AP's appeal (despite its repeated statements purporting to "grant" AP's request to expedite) violates FOIA, 5 U.S.C. § 552(a)(6)(E), and defendant's own regulations promulgated thereunder.

**THIRD CAUSE OF ACTION**
(Violation of FOIA for failure to make records available in response to November 16 request)

38. AP repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

39. Defendant's failure to make promptly available and to release in timely fashion the documents requested by AP in its November 16 request violates FOIA, 5 U.S.C. § 552(a)(3)(A).

## FOURTH CAUSE OF ACTION

(Violation of FOIA for failure to make records available in response to January 18 request)

40. AP repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

41. Defendant's failure to make promptly available and to release in a timely fashion the documents requested by AP in its January 18 request violates FOIA, 5 U.S.C. § 552(a)(3)(A).

## RELIEF REQUESTED

**WHEREFORE**, AP respectfully prays that this Court:

a. Expedite consideration of this Complaint pursuant to 28 U.S.C. § 1657;

b. Declare that the following records must be disclosed by defendant in their entirety (both in their English and non-English forms where applicable):

   i. Transcripts of any and all proceedings before Administrative Review Boards held at Guantanamo;

   ii. Copies of all written statements provided by any detainee or his representative at any Administrative Review Board hearing;

   iii. Copies of all documents provided by Guantanamo detainees to their assigned personal representatives;

   iv. Copies of any affidavits submitted to any Administrative Review Board by a witness, including but not limited to affidavits of medical personnel;

   v. Copies of documents containing details or explanations of any decision to release or transfer a Guantanamo detainee, including the reason(s) supporting the decision;

   vi. Copies of documents sufficient to identify each disciplinary action initiated since January 2002 as the result of an allegation of mistreatment at Guantanamo, including but not limited to the date the action was initiated, the name of the troop(s) charged, the status of the action, and a description of any disciplinary action recommended or taken;

vii. Copies of documents sufficient to identify each allegation of detainee-against-detainee abuse at Guantanamo since January 2002, including a description of the alleged abuse and any action(s) taken in response;

viii. Copies of documents sufficient to identify each allegation of mistreatment by translators at Guantanamo since January 2002, including a description of the alleged mistreatment and any action(s) taken in response;

ix. Copies of documents sufficient to identify the number of allegations of abuse at Guantanamo since January 2002 that have been reported through the Combatant Status Review Tribunals;

x. Copies of documents sufficient to identify the number of detainees transferred or released from Guantanamo who had been treated for medical problems during their detention; and

xi. Copies of documents sufficient to identify each construction contract relating to work performed at Guantanamo since January 2002, including the name of the contractor, the contract amount, and a description of the services covered by the contract.

c. Enjoin defendant immediately and expeditiously to provide to AP copies of the requested documents related to the Guantanamo detentions;

d. Award AP the costs of this proceeding, including reasonable attorneys' fees and costs; and

e. Grant such other and further relief as the Court deems just and proper.

Dated: June 9, 2005
New York, NY

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By: David A. Schulz
David A. Schulz (DS-3180)
Ashley I. Kissinger
230 Park Avenue, Suite 1160
New York, NY 10169
t: (212) 850-6100
f: (212) 850-6299

David H. Tomlin
The Associated Press
450 West 33rd Street
New York, NY 10001

*Attorneys for The Associated Press*

# EXHIBIT A

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AUDREY CRITCHLEY*
THOMAS CURLEY*
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ALIA L. SMITH
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WRITER'S DIRECT DIAL
(212) 850-6113

November 16, 2004

**BY FACSIMILE**

Office of Freedom of Information and Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
1155 Defense Pentagon
Room 2C757
Washington, DC 20301-1155

Attn: Matthew Waxman
Deputy Asst. Secretary of Defense for Detainee Affairs

Re: **Request for information under Federal Freedom of Information Act**

To whom it may concern:

We represent The Associated Press ("AP"), and this is a request for information pursuant to the Freedom of Information Act (5 U.S.C. § 552). AP is seeking production of the following:

1. Copies of all documents containing any allegations or accounts of mistreatment by U.S. military personnel at Guantanamo Bay, Cuba, since the detention mission began in January 2002.

2. Copies of documents sufficient to identify each disciplinary action initiated since January 2002 as the result of an allegation of mistreatment at Guantanamo Bay, Cuba, including but not limited to the date the action was initiated, the name of the troop(s) charged, the status of the action, and a description of any disciplinary action recommended or taken.

3. Copies of documents sufficient to identify each allegation of detainee-against-detainee abuse at Guantanamo Bay, Cuba, since January 2002, including a description of the alleged abuse and any action(s) taken in response.

4. Copies of documents sufficient to identify the number of allegations of abuse at Guantanamo Bay, Cuba, since January 2002 that have been reported through the Combatant Status Review Tribunals.

5. Copies of documents sufficient to identify the number of allegations of mistreatment committed by translators at Guantanamo Bay, Cuba, since January 2002, including a description of the alleged mistreatment and any action(s) taken in response.

6. Copies of documents sufficient to identify the number of detainees transferred or released from Guantanamo Bay who had been treated for medical problems during their detention.

7. Copies of documents sufficient to identify each construction contract relating to work performed at Guantanamo Bay, Cuba, since January 2002, including the name of the contractor, the contract amount, and a description of the services to be provided.

AP is seeking these materials in connection with its reporting on a continuing news story of great interest to the public. We therefore ask that you expedite your response to these requests as required by 5 U.S.C. §552(a)(6)(E). Because this information is of timely news value, if you have any questions about this request, please contact me by telephone, fax or email, rather than relying upon regular mail. You may reach me by telephone at (212) 850-6113, by fax at (212) 850-6299, or by email at hdelaine@lskslaw.com.

When you complete your work on this request, I would also appreciate it if you would contact me by phone so I can arrange for a courier to pick up the documents.

Thank you for your assistance with this request.

Very truly yours,

Halimah D. DeLaine

cc: Paisley Dodds

11/16/2004 13:51 FAX 001

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## FACSIMILE COVER SHEET

**DATE:** November 16, 2004 **TOTAL PAGES:** 3

| NAME/COMPANY | FACSIMILE NUMBER | CONFIRMATION NUMBER |
|---|---|---|
| Office of Freedom of Information and Security Review Attn: Matthew Waxman | 703-693-7341 | |

**FROM:** Halimah D. DeLaine **DIRECT DIAL:** (212) 850-6113

**CLIENT/MATTER:** 00093.007

**REMARKS:**

Bcc: Dave Schulz
David Tomlin

# EXHIBIT B

Associated Press

**Paisley L. Dodds**
Caribbean News Editor

Jan. 18, 2005

Rear Admiral James McGarrah
2000 Navy Pentagon
Room 4D 445
Washington, D.C. 20301-1155

Information Officer
Office of Freedom of Information Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
1155 Defense Pentagon
Room 2C757
Washington, D.C. 20301-1155

Re: Request for information under the Federal Freedom of Information Act

Dear Sir,

This is a request for The Associated Press for information pursuant to the Freedom of Information Act (5 U.S.C. 552). AP is seeking the following:

1. Transcripts of all testimony given at the Administrative Review Board hearings at the U.S. Naval Base in Guantanamo Bay, Cuba. The hearings began in December 2004.
2. Copies of all written statements provided by any detainee.
3. Copies of all documents that have been provided by any detainee at the U.S. Naval Base in Guantanamo Bay, Cuba, to their assigned personal representatives, including reasons they furnish should they decide not to attend their Administrative Review Board hearings.

Associated Press

**Paisley L. Dodds**
Caribbean News Editor

Copies of any affidavits submitted by witnesses to the Administrative Review Boards, including that of medical personnel.

4. Copies of the allegations against the detainees being held in Guantanamo Bay, Cuba.
5. Details and explanations of the decisions made to release or transfer detainees, including the reason why the decision was made.

AP is seeking these materials in connection with its reporting on a continuing news story of great interest to the public, both in the United States and abroad. We therefore ask that you expedite your response to these requests as required by 5 U.S.C. 552 (a)(6)(E). Because of this information is of timely news value, if you have any questions about this request, please contact me by telephone fax or e-mail, rather than relying on regular mail. You may reach me by telephone at (787) 793-5833, by fax (787) 783-4425, or by e-mail at pdodds@ap.org.

When you complete your work on this request, I would also appreciate it if you would contact me by phone so I can arrange for a courier to pick up the documents.

Thanks you for your assistance.

Sincerely,

Paisley Dodds
Caribbean news editor

# EXHIBIT C

DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

Ref: 05-F-0299

NOV 24 2004

Ms. Halimah D. DeLaine
1050 17th Street NW
Washington, DC 200036-5514

Dear Ms. DeLaine:

This is in response to your November 16, 2004, Freedom of Information Act (FOIA) request to the Office for Freedom of Information and Security Review (OFOISR).

I have granted expedited processing for your request. It is being processed in accordance with procedural requirements established in Department of Defense (DoD) Regulation 5400.7-R available on the internet at http://www.defenselink.mil/pubs/foi. Expedited processing means that the offices processing your request, including this office, have placed it ahead of all other FOIA requests in the processing queue, except for those expedited requests that have arrived earlier than your request. However, please be aware that the DoD component tasked to search for and review documents responsive to your request is under no obligation to process your request at the expense of performing their normal day-to-day duties. In some instances, the performance of these duties may be primary to the processing of your FOIA request.

You will be notified by this office when your request has been completed. Questions regarding this action may be referred to Ms. Mary Wahling, (703) 614-2411 or to Mr. Chris Marye, (703) 614-5456.

Sincerely,

C.Y. Talbott
Chief

# EXHIBIT D

**LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.**

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** ADMITTED IN NEW YORK, NEW JERSEY AND PENNSYLVANIA ONLY

WRITER'S DIRECT DIAL
(202) 508-1131

April 22, 2005

**VIA FACSIMILE AND FIRST CLASS MAIL**

Office of Freedom of Information
and Security Review
Room 2C757
1155 Defense Pentagon
Washington, DC 20301-1155

Re: ***Freedom of Information Act Appeal by The Associated Press;***
**Ref: 05-F-0299**

Dear Sir/Madam:

We represent The Associated Press ("AP") and write to appeal the constructive denial of a Freedom of Information Act request we submitted to the Department of Defense on behalf of AP in November of last year.

**I. Background**

By letter dated November 16, 2004 (attached hereto as Exhibit A), AP requested: (1) documents containing any allegations or accounts of mistreatment by U.S. military personnel at Guantanamo Bay; (2) documents identifying each disciplinary action initiated as the result of an allegation of mistreatment, including a description of any disciplinary action recommended or taken; (3) documents identifying each allegation of detainee-against-detainee abuse, including a description of the alleged abuse and any action(s) taken in response; (4) documents identifying the number of allegations of abuse that have been reported through the Combatant Status Review Tribunals; (5) documents identifying the number of allegations of mistreatment committed by translators at Guantanamo Bay, including a description of the alleged mistreatment and any action(s) taken in response; (6) documents identifying the number of detainees transferred or released from Guantanamo Bay who had been treated for medical problems during their detention; and (7) documents identifying each construction contract relating to work performed at Guantanamo Bay. AP requested expedited treatment of this request pursuant to 5 U.S.C. § 552(a)(6)(E) because the documents sought pertained to its reporting on a continuing news story of great interest to the public.

By letter dated November 24, 2004, C.Y. Talbott, Chief of the Office of Freedom of Information and Security Review, responded to AP's request for expedition, noting "I have granted expedited processing for your request." (A copy of this letter is attached hereto as Exhibit B.). This response was apparently returned to your office as undeliverable, and your office made no further effort to contact any of the other attorneys or staff members in our office. We just received it following a telephone inquiry on the status of the request on April 20.

As of today's date, *over five months* after the request was made, no documents have been received, nor has the Department of Defense ("DOD") sent any correspondence advising of any reason for delay and/or requesting an extension. In a conversation with your office on Wednesday, I was informed that the request had been "tasked out" for the process of compiling the documents, but that your office did not know – and could not even find out – whether the responsive documents had been located and/or whether the they were at the point of being reviewed/redacted.

## II. Basis for Appeal

DOD regulations require prompt action on FOIA requests. *See* DoD Directive 5400.7 ¶ C1.5.4.1. Under the Freedom of Information Act, documents are to be produced within 20 days. *See* 5 U.S.C. § 552(a)(6)(A)(i); DoD Directive 5400.7 ¶ C5.2.5.1.

DOD may properly withhold the information sought by AP only if it demonstrates "by specific and detailed proof that disclosure would defeat, rather than further, the purpose of the FOIA." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977) (citation omitted). The basic policy of the Act is to compel disclosure, and claims of exemption must therefore be supported with "specificity and [in] detail." *Senate of the Commonwealth of Puerto Rico on Behalf of Judiciary Comm. v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (alteration in original). To withhold information, DOD must provide both the factual support and "the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Mead Data Cent.*, 566 F.2d at 261.

Despite its purported agreement to "expedite" AP's request (as it was required to do by the terms of FOIA), DOD has not produced any documents, has not claimed any exemption to disclosure, and has not sought an extension of time to respond to AP's request. DOD's failure to produce the requested materials or further communicate with AP and its attorneys is improper. DOD's refusal to produce the requested documents is particularly improper given the time-sensitive nature of AP's request and the obviously important news value of the documents sought (which DOD recognized in determining at the outset that the requests should be expedited). The Freedom of Information Act directs that expedited treatment should be provided when a request is

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

"made by a person primarily engaged in disseminating information" and there is an "urgency to inform the public of actual or alleged Federal Government activity." 5 U.S.C.A. § 552(a)(6)(E)(v)(II). Clearly, the AP is a news organization "primarily engaged in disseminating information," and an "urgency to inform" exists because (1) the information relates to a currently unfolding story, (2) delaying release of the information harms the public interest, and (3) the request concerns federal governmental activity. *Al-Fayed v. CIA*, 245 F.3d 300 (D.C. Cir. 2001). Here, not only has DOD failed to provide expedited treatment, it has failed to comply with its ordinary obligations under FOIA to produce requested documents within 20 days.

Pursuant to DOD regulations, appeal procedures are available to FOIA requesters for "any *determination found to be adverse in nature by the requester.*" DoD Directive 5400.7 ¶ C5.3.1 (emphasis in original). The DOD's failure to produce the records or claim any exemption is adverse to AP, and as such, AP hereby appeals the DOD's "constructive denial" of the FOIA request. *See* DoD Directive 5400.7 ¶ C.5.3.1 (noting that "not providing a responsive determination to a FOIA request within the statutory time limits" is an adverse determination).

**III. Request for Relief**

For the foregoing reasons, we respectfully submit that DOD has constructively failed to meet its legal obligation to disclose the information requested on November 16, 2004.

Again we advise you that the information is sought in connection with reporting by AP on a continuing news story of great public interest. Therefore we respectfully request expedited treatment of this appeal. In any event, we trust that we will receive your decision within 20 business days as required by DoD Directive 5400.7 ¶ C.5.3.2 and 5 U.S.C. § 552(a)(6)(A)(ii).

Thank you for your prompt attention to this matter.

Very truly yours,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By [signature]
Ashley I. Kissinger

cc: Dave Tomlin, Esq.
David Schulz, Esq.

# EXHIBIT A

# LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

230 PARK AVENUE, SUITE 1160
NEW YORK, NEW YORK 10169

(212) 850-6100
FACSIMILE (212) 850-6299

1050 17TH STREET, N.W., WASHINGTON, D.C. 20036-5514
(202) 508-1100 FACSIMILE (202) 861-9888

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JAMES E. GROSSBERG*
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LEE LEVINE*
ROBERT PENCHINA
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DAVID A. SCHULZ
GAYLE C. SPROUL
MICHAEL D. SULLIVAN*

NATHAN SIEGEL

JEANETTE MELENDEZ BEAD*
CHAD R. BOWMAN*
AUDREY CRITCHLEY*
THOMAS CURLEY*
HALIMAH D. DELAINE*
ASHLEY I. KISSINGER*
ADAM J. RAPPAPORT*
ALIA L. SMITH
*NOT ADMITTED IN NEW YORK

WRITER'S DIRECT DIAL
(212) 850-6113

November 16, 2004

**BY FACSIMILE**

Office of Freedom of Information and Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
1155 Defense Pentagon
Room 2C757
Washington, DC 20301-1155

Attn: Matthew Waxman
Deputy Asst. Secretary of Defense for Detainee Affairs

Re: **Request for information under Federal Freedom of Information Act**

To whom it may concern:

We represent The Associated Press ("AP"), and this is a request for information pursuant to the Freedom of Information Act (5 U.S.C. § 552). AP is seeking production of the following:

1. Copies of all documents containing any allegations or accounts of mistreatment by U.S. military personnel at Guantanamo Bay, Cuba, since the detention mission began in January 2002.

2. Copies of documents sufficient to identify each disciplinary action initiated since January 2002 as the result of an allegation of mistreatment at Guantanamo Bay, Cuba, including but not limited to the date the action was initiated, the name of the troop(s) charged, the status of the action, and a description of any disciplinary action recommended or taken.

3. Copies of documents sufficient to identify each allegation of detainee-against-detainee abuse at Guantanamo Bay, Cuba, since January 2002, including a description of the alleged abuse and any action(s) taken in response.

4. Copies of documents sufficient to identify the number of allegations of abuse at Guantanamo Bay, Cuba, since January 2002 that have been reported through the Combatant Status Review Tribunals.

5. Copies of documents sufficient to identify the number of allegations of mistreatment committed by translators at Guantanamo Bay, Cuba, since January 2002, including a description of the alleged mistreatment and any action(s) taken in response.

6. Copies of documents sufficient to identify the number of detainees transferred or released from Guantanamo Bay who had been treated for medical problems during their detention.

7. Copies of documents sufficient to identify each construction contract relating to work performed at Guantanamo Bay, Cuba, since January 2002, including the name of the contractor, the contract amount, and a description of the services to be provided.

AP is seeking these materials in connection with its reporting on a continuing news story of great interest to the public. We therefore ask that you expedite your response to these requests as required by 5 U.S.C. §552(a)(6)(E). Because this information is of timely news value, if you have any questions about this request, please contact me by telephone, fax or email, rather than relying upon regular mail. You may reach me by telephone at (212) 850-6113, by fax at (212) 850-6299, or by email at hdelaine@lskslaw.com.

When you complete your work on this request, I would also appreciate it if you would contact me by phone so I can arrange for a courier to pick up the documents.

Thank you for your assistance with this request.

Very truly yours,

Halimah D. DeLaine

cc: Paisley Dodds

# EXHIBIT B

# DEPARTMENT OF DEFENSE

Office of Freedom of Information and Security Review
Room 2C757
1155 Defense Pentagon
Washington, DC 20301-1155

## Facsimile Transmittal

Date: 20 Apr 05

To: Ashley Kissinger

Organization: Levine Sullivan Koch + Schulz

Office Phone: 202 508 1131

FAX Number: 202 861 9888

From: Mary Wahling

Phone: (703) ~~69~~ 614 2411 FAX: (703) 693-7341

Total Pages Transmitted (including cover sheet): 2

Comments:

DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

Ref: 05-F-0299

NOV 2 4 2004

Ms. Halimah D. DeLaine
1050 17th Street NW
Washington, DC 200036-5514

Dear Ms. DeLaine:

This is in response to your November 16, 2004, Freedom of Information Act (FOIA) request to the Office for Freedom of Information and Security Review (OFOISR).

I have granted expedited processing for your request. It is being processed in accordance with procedural requirements established in Department of Defense (DoD) Regulation 5400.7-R available on the internet at http://www.defenselink.mil/pubs/foi. Expedited processing means that the offices processing your request, including this office, have placed it ahead of all other FOIA requests in the processing queue, except for those expedited requests that have arrived earlier than your request. However, please be aware that the DoD component tasked to search for and review documents responsive to your request is under no obligation to process your request at the expense of performing their normal day-to-day duties. In some instances, the performance of these duties may be primary to the processing of your FOIA request.

You will be notified by this office when your request has been completed. Questions regarding this action may be referred to Ms. Mary Wahling, (703) 614-2411 or to Mr. Chris Marye, (703) 614-5456.

Sincerely,

C.Y. Talbott
Chief

# EXHIBIT E

**DEPARTMENT OF DEFENSE**
OFFICE OF FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

Ref: 05-A-01014(A)

Ms. Ashley I. Kissinger
Levine, Sullivan, Koch & Schulz, LLP
1050 Seventeenth Street, NW, Suite 800
Washington, DC 20036-5514

Dear Ms. Kissinger:

This is in response to your April 22, 2005, Freedom of Information Act (FOIA) appeal on behalf of the Associated Press (AP).

We granted the AP expedited processing in our November 24, 2004 response to Ms. Halimah D. DeLaine. That determination is still valid. However, as a result of your appeal for a constructive denial because no records have been processed, the AP's request of November 16, 2004, will be processed within the expedited FOIA appeals channel.

The action officer for this appeal is Mr. Stephen L. Fisher, (703) 695-6428.

Sincerely,

C. V. Talbott
Chief

[redacted]

WASHINGTON DC MAY 11 '05

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Ms. Ashley I. Kissinger
Levine, Sullivan, Koch & Schulz, LLP
1050 Seventeenth Street, NW, Suite 800
Washington, DC 20036-5514

FIRST CLASS

# EXHIBIT F

DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

19 JAN 2005

Ref: 05-F-0796

Ms. Paisley Dodds
Caribbean News Editor
The Associated Press
Metro Office Park
8 No. 1 Street, Suite 108
Guaynabo, PR 00968-1721

Dear Ms. Dodds:

This is in response to your January 18, 2005, Freedom of Information Act (FOIA) request to the Office for Freedom of Information and Security Review (OFOISR) and to Rear Admiral James McGarrah for information regarding the Administrative Review Board hearings at the U.S. Naval Base in Guantanamo Bay, Cuba.

I have granted expedited processing for your request. It is being processed in accordance with procedural requirements established in Department of Defense (DoD) Regulation 5400.7-R available on the internet at http://www.defenselink.mil/pubs/foi. Expedited processing means that the offices processing your request, including this office, have placed it ahead of all other FOIA requests in the processing queue, except for those expedited requests that have arrived earlier than your request. However, please be aware that the DoD component tasked to search for and review documents responsive to your request is under no obligation to process your request at the expense of performing their normal day-to-day duties. In some instances, the performance of these duties may be primary to the processing of your FOIA request.

Our point of contact for this action is Mary Wahling, (703) 614-2411.

Sincerely,

C. Y. Talbott
Chief

# EXHIBIT G

**LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.**

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JEANETTE MELENDEZ BEAD*
CHAD R. BOWMAN*
AUDREY CRITCHLEY*
THOMAS CURLEY*
ADAM J. RAPPAPORT*
ALIA L. SMITH
*NOT ADMITTED IN NEW YORK

WRITER'S DIRECT DIAL
(212) 850-6111

April 15, 2005

**VIA FEDERAL EXPRESS**

Directorate for Freedom of Information
and Security Review
Room 2C757
1155 Defense Pentagon
Washington, DC 20301-1155

**Re:** ***Freedom of Information Act Appeal by The Associated Press*; Ref: 05-F-0796**

Dear Sir/Madam:

We represent The Associated Press ("AP") and write to appeal the constructive denial of a Freedom of Information Act request we originally submitted to the Department of Defense in January of this year.

## I. Background

By letter dated January 18, 2005 (attached hereto as Exhibit A), AP requested: (1) transcripts of all testimony given at the Administrative Review Board hearing at the U.S. Naval Base in Guantanamo Bay, Cuba, which began in December 2004; (2) copies of all written statements provided by any detainee; (3) copies of all documents that have been provided by any detainee at the U.S. Naval Base in Guantanamo Bay, Cuba, to their assigned personal representatives, including reasons they furnish should they decide not to attend their Administrative Review Board hearings, and copies of any affidavits submitted by witnesses to the Administrative Review Boards, including that of medical personnel; (4) copies of the allegations against the detainees being held in Guantanamo Bay, Cuba; and (5) details and explanations of the decisions made to release or transfer detainees. AP requested expedited treatment of this request pursuant to 5 U.S.C. § 552(a)(6)(E) because the documents sought pertained to its reporting on a continuing news story of great interest to the public.

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By letter dated January 19, 2005, C.Y. Talbott, Chief of the Office of Freedom of Information and Security Review, responded to AP's request for expedition, noting "I have granted expedited processing for your request." (A copy of this letter is attached hereto as Exhibit B.)

As of today's date, three months after the request was made, no documents have been received, nor has the Department of Defense ("DOD") sent any correspondence advising of any reason for delay and/or requesting an extension.

## II. Basis for Appeal

DOD regulations require prompt action on FOIA requests. *See* DoD Directive 5400.7, C1.5.4.1. Under the Freedom of Information Act, documents are to be produced within 20 days. *See* 5 U.S.C. § 552(a)(6)(A)(i); DoD Directive 5400.7 at C.5.2.5.1.

DOD may properly withhold the information sought by AP only if it demonstrates "by specific and detailed proof that disclosure would defeat, rather than further, the purpose of the FOIA." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977) (citation omitted). The basic policy of the Act is to compel disclosure, and claims of exemption must therefore be supported with "specificity and [in] detail." *Senate of the Commonwealth of Puerto Rico on Behalf of Judiciary Comm. v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (alteration in original). To withhold information, DOD must provide both the factual support and "the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Mead Data Cent.*, 566 F.2d at 261.

DOD has not produced any documents, has not claimed any exemption to disclosure, and has not sought an extension of time to respond to AP's request DOD's failure to produce the requested materials or further communicate with AP and its attorneys is improper. DOD's refusal to produce the requested documents is particularly improper given the time-sensitive nature of AP's request and the important news value of the documents sought (which DOD recognized in determining at the outset that the requests should be expedited). The Freedom of Information Act directs that expedited treatment should be provided when a request is "made by a person primarily engaged in disseminating information" and there is an "urgency to inform the public of actual or alleged Federal Government activity." 5 U.S.C.A. § 552(a)(6)(E)(v)(II). Clearly, the AP is a news organization "primarily engaged in disseminating information," and an "urgency to inform" exists because (1) the information relates to a currently unfolding story, (2) delaying release of the information harms the public interest, and (3) the request concerns federal governmental activity. *Al-Fayed v. CIA*, 245 F.3d 300 (D.C. Cir. 2001). Here, not only has DOD failed to provide expedited treatment, it has failed to comply with its ordinary obligations under FOIA to produce requested documents within 20 days.

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

Pursuant to DOD regulations, appeal procedures are available to FOIA requesters for "any *determination found to be adverse in nature by the requester.*" DoD Directive 5400.7, C5.3.1 (emphasis in original). The DOD's failure to produce the records or claim any exemption is adverse to AP, and as such, AP hereby appeals the DOD's "constructive denial" of the FOIA request. *See* DoD Directive 5400.7 C.5.3.1 (noting that "not providing a responsive determination to a FOIA request within the statutory time limits" is an adverse determination).

**III. Request for Relief**

For the foregoing reasons, we respectfully submit that DOD has constructively failed to meet its legal obligation to disclose the documents and information requested on January 18, 2005.

Again we advise you that the information is sought in connection with reporting by AP on a continuing news story of great public interest. Therefore we respectfully request expedited treatment of this appeal. In any event, we trust that we will receive your decision within 20 business days as required by DOD Directive 5400.7, C.5.3.3.2 and 5 U.S.C § 552(a)(6)(A)(ii).

Thank you for your prompt attention to this matter.

Very truly yours,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By [signature]
Alia L. Smith

cc: Dave Tomlin, Esq.
David Schulz, Esq.

# EXHIBIT A

**Associated Press**

**Paisley L. Dodds**
Caribbean News Editor

Jan. 18, 2005

Rear Admiral James McGarrah
2000 Navy Pentagon
Room 4D 445
Washington, D.C. 20301-1155

Information Officer
Office of Freedom of Information Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
1155 Defense Pentagon
Room 2C757
Washington, D.C. 20301-1155

Re: Request for information under the Federal Freedom of Information Act

Dear Sir,

This is a request for The Associated Press for information pursuant to the Freedom of Information Act (5 U.S.C. 552). AP is seeking the following:

1. Transcripts of all testimony given at the Administrative Review Board hearings at the U.S. Naval Base in Guantanamo Bay, Cuba. The hearings began in December 2004.
2. Copies of all written statements provided by any detainee.
3. Copies of all documents that have been provided by any detainee at the U.S. Naval Base in Guantanamo Bay, Cuba, to their assigned personal representatives, including reasons they furnish should they decide not to attend their Administrative Review Board hearings.

Metro Office Park, 8 No. 1 Street, Suite 108 Guaynabo, Puerto Rico 00968-1721 Tel. (787) 793-5833 • Fax (787) 783-0427

**AP Associated Press**

**Paisley L. Dodds**
Caribbean News Editor

Copies of any affidavits submitted by witnesses to the Administrative Review Boards, including that of medical personnel.

4. Copies of the allegations against the detainees being held in Guantanamo Bay, Cuba.
5. Details and explanations of the decisions made to release or transfer detainees, including the reason why the decision was made.

AP is seeking these materials in connection with its reporting on a continuing news story of great interest to the public, both in the United States and abroad. We therefore ask that you expedite your response to these requests as required by 5 U.S.C. 552 (a)(6)(E). Because of this information is of timely news value, if you have any questions about this request, please contact me by telephone fax or e-mail, rather than relying on regular mail. You may reach me by telephone at (787) 793-5833, by fax (787) 783-4425, or by e-mail at pdodds@ap.org.

When you complete your work on this request, I would also appreciate it if you would contact me by phone so I can arrange for a courier to pick up the documents.

Thanks you for your assistance.

Sincerely,

Paisley Dodds
Caribbean news editor

# EXHIBIT B

**DEPARTMENT OF DEFENSE**
**OFFICE OF FREEDOM OF INFORMATION AND SECURITY REVIEW**
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

19 JAN 2005

Ref: 05-F-0796

Ms. Paisley Dodds
Caribbean News Editor
The Associated Press
Metro Office Park
8 No. 1 Street, Suite 108
Guaynabo, PR 00968-1721

Dear Ms. Dodds:

This is in response to your January 18, 2005, Freedom of Information Act (FOIA) request to the Office for Freedom of Information and Security Review (OFOISR) and to Rear Admiral James McGarrah for information regarding the Administrative Review Board hearings at the U.S. Naval Base in Guantanamo Bay, Cuba.

I have granted expedited processing for your request. It is being processed in accordance with procedural requirements established in Department of Defense (DoD) Regulation 5400.7-R available on the internet at http://www.defenselink.mil/pubs/foi. Expedited processing means that the offices processing your request, including this office, have placed it ahead of all other FOIA requests in the processing queue, except for those expedited requests that have arrived earlier than your request. However, please be aware that the DoD component tasked to search for and review documents responsive to your request is under no obligation to process your request at the expense of performing their normal day-to-day duties. In some instances, the performance of these duties may be primary to the processing of your FOIA request.

Our point of contact for this action is Mary Wahling, (703) 614-2411.

Sincerely,

C. Y. Talbott
Chief

# EXHIBIT H

**DEPARTMENT OF DEFENSE**
OFFICE OF FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

Ref: 05-A-01013(A)

Ms. Alia L. Smith
Levine, Sullivan, Koch & Schulz, LLP
230 Park Avenue, Suite 1160
New York, NY 10169

Dear Ms. Smith:

This is in response to your April 15, 2005, Freedom of Information Act (FOIA) appeal on behalf of the Associated Press (AP).

We granted the AP expedited processing in our January 19, 2005 response to Ms. Paisley Dodds. That determination is still valid. However, as a result of your appeal for a constructive denial because no records have been processed, the AP's request of January 18, 2005, will be processed within the expedited FOIA appeals channel.

The action officer for this appeal is Mr. Stephen L. Fisher, (703) 695-6428.

Sincerely,

C. Y. Talbott
Chief

[redacted]

10169+1160 17

WASHINGTON DC
MAY 1 05

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$0.37 U.S. POSTAGE

Ms. Alia L. Smith
Levine, Sullivan, Koch & Schulz, LLP
230 Park Avenue, Suite 1160
New York, NY 10169

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